PRESIDENT SHOES SDN BHD

v.

MACCI FASHION CENTRE SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[ORIGINATING SUMMONS NO: S2-24-954-1996]
27 AUGUST 1997

CIVIL PROCEDURE: *Affidavits - Filing and service - Filing affidavit out of time - Whether affidavit ought to be rejected - Rules of the High Court 1980, O. 32 r. 13(2)*

This was an application by the plaintiff for an order for sale pursuant to O. 31(1) of the Rules of the High Court 1980 ('the RHC') read together with s. 25 and item 3 of the Schedule to s. 25(2) of the Courts of Judicature Act 1964 ('the CJA'). According to the facts, both plaintiff and defendant were co-owners of two pieces of property. By virtue of a lease agreement between the parties, the plaintiff agreed to allow the defendant to utilise its half undivided share of the property on certain terms and conditions. After the expiry of two years, the defendant exercised its option to renew for a further three years. After the expiry of the term pursuant to the option, the defendant continued to rent the said property at the same rates as before. As negotiations for new rates did not materialise, pursuant to the agreement, the defendant expressed its intention to exercise its option to purchase the plaintiff's half share. The plaintiff agreed but the defendant made no further moves.

The plaintiff therefore applied for leave to sell the property by public auction and for the proceeds of the sale to be distributed equally between the parties and for other consequential orders.

Held:

[1] Order 32 r. 13(2)(a) of the RHC provides that an affidavit in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application whereas O. 32 r. 13(2)(b) provides that an affidavit in reply must be filed and served on the other party within 14 days from the date on which the affidavit he intends to reply was served on him. The defendant's affidavit – whether it be a regarded as an affidavit in support of the application or an affidavit in reply to the plaintiff's affidavit – was filed on 12 June 1997 and was therefore well out of time.

[2] Furthermore, the defendant's affidavit was filed after the hearing had commenced. The defendant should have at least applied to the court for leave to file an affidavit out of time and if it had done so, the court could have exercised its discretion under O. 92 r. 4 of the RHC. No such application had been made and the affidavit therefore was rejected.

[Plaintiff's application allowed.]

Legislation referred to:
Courts of Judicature Act 1964, s. 25(1), (2), item 3 of Schedule to s. 25(2)
Rules of the High Court 1980, O. 31(1), O. 32 r. 13(2)(a), (b), O. 92 r. 4

For the plainitff - KL Low & Shamira Ali; M/s Soo Thien Ming & Nashrah
For the defendant - TA Khoo; M/s Tan Kim Soon & Co

JUDGMENT

RK Nathan JC:

This is an application by the plaintiff for an order for sale pursuant to O. 31(1) of the Rules of the High Court 1980 ('the RHC') read together with s. 25 and item 3 of the schedule to s. 25(2) of the Courts of Judicature Act 1964 (Act 91).

Facts

Both the plaintiff and defendant are co-owners of two pieces of property known as shoplots in Sungai Wang Plaza, Kuala Lumpur. By way of a compensation agreement dated 1 September 1990 which to all intents and purposes was a lease agreement, the plaintiff agreed to allow the defendant to utilise and use its half undivided share of the shoplots upon terms and conditions contained in the compensation agreement. The defendant occupied the said two lots and upon expiry of the lease proceeded to occupy the lots having exercised the option to renew for a further three years as contained in the compensation agreement. After the expiry of the lease pursuant to the option, the defendant continued to rent the said two lots at the same rates as before. There were negotiations for the new rates which did not materialise. The defendant then wrote to the plaintiff on 1 August 1996 expressing its desire to exercise its right of option to purchase the plaintiff's half share, pursuant to cl. 12 of the compensation agreement. The plaintiff responded by its letter dated 5 August 1996 agreeing to sell its half share pursuant to cl. 12 of the said agreement. Thereafter the defendant made no further moves. Hence this application by the plaintiff for leave of court to sell the said two lots by public auction and after deducting all expenses for the proceeds to be distributed equally between the parties and for other consequential orders.

Court's Findings

Order 31 r. 1 of the RHC reads:

> 1 Power to order sale of immovable property
>
> Where in any cause or matter relating to any immovable property it appears necessary or expedient for the purposes of the cause or matter that the property or any part thereof should be sold, the court may order that property or part to be sold, and any party bound by the order and in possession of that property or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the court may direct.

Section 25 of the Courts of Judicature Act 1964 reads:

> 25 Powers of the High Court
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> (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.
>
> (2) Without prejudice to the generality of sub-s. (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

Schedule 3 to s. 25(2) reads:

> 3. Partition of land
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> Power to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part thereof to be sold, and to give all necessary and consequential directions.

Procedure wise the application is correct and the defendant, quite correctly took no procedural objections.

On 2 May 1997 Ms. Yokinee S for the defendant submitted that since it was a term of the agreement that the defendant has the option to purchase, any order made by this court for a sale by public auction would be illegal and that therefore I ought to reject this application. At that stage by consent parties requested that I adjourn the matter so that they could attempt settlement. On 16 June 1997 when this case was fixed for continued hearing Mr. T.A. Khoo appeared for the defendant and informed the court that his firm had taken over

from the previous solicitors and that he was unaware that the matter was part heard. He asked for an adjournment to study the notes. Mr. K.L. Low for the plaintiff objected to any adjournment. Before I could even rule on the request for an application Mr. Khoo conceded that this court had jurisdiction to order a sale if necessary. In other words he had in my view very correctly abandoned the previous solicitors' argument that this court had no right to order a sale by public auction. Mr. Khoo however raised estoppel and confirmed his willingness to submit on estoppel.

Late Affidavit

Mr. Khoo then referred me to an affidavit encl 7 affirmed by one Lee Yat Yu a director of the defendant which explained the question of estoppel. This affidavit was filed on 12 June 1997. Mr. Low objected to the said affidavit on the ground that the said affidavit was filed 14 days after the last affidavit which was filed on 25 April 1997 (encl 5). Mr. Khoo however pointed out that encl 5 was also an affidavit by Lee Yat Yu. In the circumstances he argued that O. 32 r. 13(2)(b) of the RHC cannot apply to encl 7 and that I ought not to reject the same.

Order 32 r. 13(2) reads:

> (2) Save as otherwise provided in these rules –
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

Clearly encl 7 which was filed on 12 June 1997 was filed about one and a half months later. Whilst it can be argued that encl 7 was not in reply to any affidavit filed by the plaintiff, I rejected encl 7 on two grounds. Firstly, if encl 7 is held not to be a reply to an affidavit of the plaintiff and thereby not falling within O. 32 r. 13(2)(b) then clearly encl 7 must fall within O. 32 r. 13(2)(a). In other words, it is an affidavit filed in support of the application and since the application itself was filed on 31 December 1996, encl 7 is well out of time and must therefore be rejected. Secondly, encl 7 was filed after the hearing had commenced. The least the defendant could have done is to apply to court for leave to file an affidavit out of time and if the matter to be averred would assist the court in arriving at a just decision, perhaps the court could have been invited to exercise its discretion under O. 92 r. 4 of the RHC. No such application was made in this case. I therefore

rejected the defendant's attempt to refer to encl 7. Once I rejected encl 7 Mr. Khoo conceded that there was no evidence of estoppel raised in the application or affidavits.

In the circumstances I granted an order in terms of encl 1 except for the last prayer being a general prayer for the court to grant any order it sees just and proper.

Reported by Mariette Peters-Goh